

STATE OF MICHIGAN

IN THE SUPREME COURT

APPEAL FROM THE MICHIGAN COURT OF APPEALS
Honorable Cavanagh, P.J., and Gage and Zahra, J.J.

PEOPLE OF THE STATE OF MICHIGAN,

Supreme Court No. 126371

Plaintiff-Appellant,

vs.

DARIN HENDRICK,

Defendant-Appellee.

MI Court of Appeals No. 248892
Lower Court Nos. 99-010970-02 and 00-011760-01

DEFENDANT-APPELLEE'S BRIEF ON APPEAL

**** ORAL ARGUMENT REQUESTED ****

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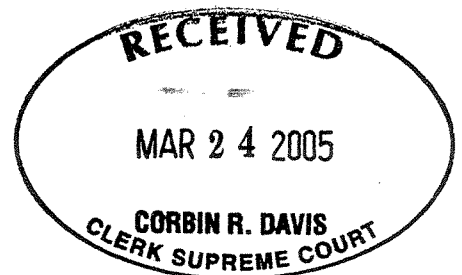


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STATEMENT OF JURISDICTION

Defendant-Appellee accepts the People's statement that this Court has jurisdiction over this case pursuant to the Order granting leave to appeal dated November 4, 2004. MCR 7.301(2).

COUNTER-STATEMENT OF QUESTIONS INVOLVED

- I. DOES MR. HENDRICK'S PRISON SENTENCE AFTER THE PROBATION VIOLATION OF HIS PLEA BASED CONVICTION FOR POSSESSION OF A MOLOTOV COCKTAIL REPRESENT A DEPARTURE FROM THE SENTENCING GUIDELINES WITHOUT SUBSTANTIAL AND COMPELLING REASONS FOR DOING SO, AND WHERE THE LEGISLATIVE SENTENCING GUIDELINES ARE APPLICABLE TO SUCH A SITUATION, IS RESENTENCING REQUIRED?**

The Michigan Court of Appeals answered "Yes".

Defendant-Appellee answers "Yes".

Plaintiff-Appellant would answer "No".

STATEMENT OF FACTS

Defendant-Appellee accepts the statement of material facts and proceedings as set forth in Plaintiff-Appellant's Brief on Appeal, except to the extent that it states any arguments or conclusions regarding the issue involved. Where appropriate, additional and/or counter-facts will be added to the argument section, *infra*.

ARGUMENT

MR. HENDRICK'S PRISON SENTENCE AFTER THE PROBATION VIOLATION OF HIS PLEA BASED CONVICTION FOR POSSESSION OF A MOLOTOV COCKTAIL REPRESENTS A DEPARTURE FROM THE SENTENCING GUIDELINES WITHOUT SUBSTANTIAL AND COMPELLING REASONS FOR DOING SO, AND WHERE THE LEGISLATIVE SENTENCING GUIDELINES ARE APPLICABLE TO SUCH A SITUATION, RESENTENCING IS REQUIRED.

STANDARD OF REVIEW:

Defendant-Appellee accepts the People's statement that an issue concerning the application of the legislatively created sentencing guidelines is reviewed *de novo*. *People v. Hegwood*, 465 Mich. 432 (2001); *People v. Denio*, 454 Mich. 691 (1997).

ARGUMENT:

In August of 1998, the Michigan legislature signed Act 317, Public Acts of Michigan, 1998 ("Act 317") into law. Act 317 set forth statutory sentencing guidelines to cover sentencing for virtually all felony offenses committed on or after January 1, 1999. M.C.L. §769.34(2); M.C.L. §777.1 *et. seq.* The offense at bar is governed by the statutory sentencing guidelines. M.C.L. §777.16k. Those guidelines were computed before the initial sentencing. Unlike the judicial sentencing guidelines, where the ranges were mere recommendations to the trial judge, the statutory sentencing guidelines have the effect of law. As this Court observed in *People v. Hegwood*, *supra* at 438-39:

This Court's [judicial] sentencing guidelines were 'mandatory' only in the sense that the sentencing court was obliged to follow the procedure of 'scoring' a case on the basis of the circumstances of the offense and the offender, and articulate the basis for any departure from the recommended sentence range yielded by this scoring. However, because the recommended ranges found in the judicial

guidelines were not the product of legislative action, a sentencing judge was not necessarily obliged to impose a sentence within those ranges.

Effective January 1, 1999, the state of Michigan embarked on a different course. By formal enactment of the Legislature, Michigan became subject to guidelines with sentencing ranges that *do* require adherence (emphasis supplied, italics in original).

Thus, to comply with the mandate of M.C.L. §769.34(2), a sentencing court must impose a minimum sentence within the guidelines range absent a departure for substantial and compelling reasons. However, the sentencing judge found that the legislative guidelines did not apply to a sentencing after a probation violation and sentenced Mr. Hendrick to 10 to 20 years in prison. (48a). This sentence for Mr. Hendrick's conviction for possession of a Molotov cocktail did not fall within the statutory guidelines range of 12 to 48 months in prison¹, and the court did not articulate any substantial and compelling reasons for the departure. A remand is therefore in order for the reasons stated *infra*, and in accordance with *People v. Babcock (Babcock III)*, 469 Mich. 247 (2003).

Mr. Hendrick initially appealed his sentence by way of an application for leave to appeal to the Michigan Court of Appeals, which was denied on September 30, 2002. (18b). In lieu of granting leave to appeal, this Court remanded the case to the Michigan Court of Appeals "for

¹ The Sentence Information Report for this offense is not in the lower court record. In the original appeal, the prosecutor did not contest this calculation. (24b n.5). The prosecutor confirmed that Mr. Hendrick's offense variable scoring placed him in the D-I level range for the sentence of attempted home invasion, a class B felony. Assuming Mr. Hendrick would also fall in the D-I level range for the sentence of possession of a Molotov cocktail, a class C felony, his minimum sentence range as a fourth habitual offender would be 12-48 months in prison.

The prosecutor's reference at page 5 of their brief on appeal to Mr. Hendrick's sentencing guidelines range of 19-38 months in prison refers only to the attempted first-degree home invasion charge, for which Mr. Hendrick received a sentence of 1-5 years in prison in lower court case No. 99-10970-02. That sentence is not the subject of the instant appeal as noted by the Michigan Court of Appeals in footnote 6 of their published opinion. (24b-25b).

consideration as on leave granted, of (1) whether the legislative sentencing guidelines apply to sentences imposed after probation violation, and (2) if not, whether the legislative guidelines permit application for the *People v. Milbourn*, 435 Mich. 630 (1990), proportionality principles in such situations.” (19b).

On May 4, 2004, the Michigan Court of Appeals (Zahra, J.) issued a published opinion finding that the legislative sentencing guidelines apply to sentences imposed after a probation violation. *People v. Hendrick*, 261 Mich. App. 673 (2004). (20b-26b). This Court granted the prosecutor’s application for leave to appeal on November 4, 2004. (27b).

As the prosecution correctly observes, it was well established that the **judicial** sentencing guidelines did not apply to probation violation sentencings. *People v. Wagner*, 193 Mich. App. 679 (1992); *People v. Reynolds*, 195 Mich. App. 182 (1992). These decisions, however, are of no moment in determining whether the **statutory** sentencing guidelines apply to sentencing after revocation of probation. Because the judicial guidelines were a creation of the Supreme Court, the Court was free to determine their application as it saw fit. The issue here, in contrast, is one of statutory interpretation.

The primary goal of statutory construction is to ascertain and give effect to the intent of the legislature. *People v. Morson*, 471 Mich. 248, 255 (2004). The most relevant starting point for discerning legislative intent lies in the plain language of the statutes in question. The words contained in the statute itself contain the most reliable source of the Legislature’s intent. *Shinholster v. Annapolis Hosp.*, 471 Mich. 540, 548 (2004). Ample authority rests in the legislative guidelines themselves for applying the guidelines to a sentence imposed after a probation violation. The guidelines provide in plain, unambiguous terms:

769.34 Sentencing guidelines; duties of court. (2) Except as otherwise provided in this subsection or for a departure from the appropriate minimum sentence range

provided for under subsection (3), the minimum sentence imposed by a court of this state for a felony enumerated in part 2 of chapter XVII committed on or after January 1, 1999 **shall** be within the appropriate sentence range under the version of those sentencing guidelines in effect on the date the crime was committed. (emphasis supplied).

The statute's admonition that a sentence "shall" be within an appropriate range supports *Hegwood's* holding that adherence to the legislative guidelines is mandatory for sentencing courts. Where the Legislature manifests its intent clearly in the language of a statute, that statute must be enforced as written, free of any contrary judicial gloss. *Morales v. Auto-Owners Insurance Co.*, 469 Mich. 487, 490 (2003). Here, the trial court imposed a sentence for an offense enumerated in the guidelines that occurred on July 21, 2000, well after the guidelines' effective date. However, because it was operating under the erroneous belief that the guidelines do not apply to probation violations, the trial court imposed a prison term of ten to twenty years, more than double the maximum minimum allowed under the guidelines. Because the felony underlying the probation violation falls squarely within the ambit of the sentencing guidelines, the sentencing court committed reversible error by refusing to score Mr. Hendrick's guidelines.

According to *People v. Kaczmarek*, 464 Mich. 478 (2001), there is no separate crime of "probation violation." Rather, a finding that the defendant has violated probation "simply clears the way for a resentencing on the original offense." *Id.*, at 483. Logically then, and as a matter of statutory construction, the legislative sentencing guidelines must apply to the final sentencing in a case where probation has failed. This conclusion comports with the plain language of M.C.L. §771.4, which provides when an order for probation is revoked, "the court may sentence the probationer in the same manner and to the same penalty as the court might have done if the probation order had never been made."

One could protest that the sentencing guidelines prepared prior to the initial sentencing may not capture all the relevant circumstances of the defendant's conduct at the time of the probation violation sentencing. But the answer to that concern is obvious. The sentencing guidelines can easily be "updated" if there is additional criminal history to be scored. This Court has required as much in *People v. Triplett*, 407 Mich. 510 (1980), which observed that "a reasonably updated presentence report is required if a defendant is resentenced."

For that reason Defendant-Appellee concedes that in appropriate cases, a sentencing court may find that the circumstances surrounding the probation violation provide substantial and compelling reasons for an upward departure. However, the court would be limited by M.C.L. §769.34(3)² and this Court's decision in *Babcock*, *supra*, which instructs the sentencing court to clearly articulate its reasons for departure on the record. Furthermore, the sentencing court is only to consider objective and verifiable factors in assessing whether substantial and compelling reasons exist. *Babcock* at 257. Such factors must keenly or irresistibly grab the court's attention and be of considerable worth in deciding the length of a sentence." *Babcock*, *supra* at 258 (quoting *People v. Fields*, 448 Mich. 58 (1995)). Finally, such factors only exist in exceptional cases. *Id.*

In its Order granting leave to appeal, this Court specifically directed the parties to address whether M.C.L. §771.4 "permits a trial court to find that the conduct giving rise to the probation violation constitutes a substantial and compelling reason to depart from the sentencing guidelines." (27b). As stated above, the statute provides, in relevant part, that "if a probation

² M.C.L. §769.34(3) states in relevant part, "A court may depart from the appropriate sentence range established under the sentencing guidelines ... if the court has a substantial and compelling reason for that departure and states on the record the reasons for departure."

order is revoked, the court may sentence the probationer in the same manner and to the same penalty as the court might have done if the probation order had never been made.”

The prosecution encourages this Court to adopt a bright line rule that the very fact a defendant violates his probation should supply a substantial and compelling reason for departure. (Brief at page 13-14). However, such a rule would violate Michigan’s longstanding adherence to the principle of individualized sentencing. As this Court observed in *People v. Coles*, 417 Mich. 523, 537 (1983) (overruled on other grounds) “the policy of this state favors individualized sentencing for every convicted defendant. The sentence must be tailored to fit the particular circumstances of the case and the defendant.” The prosecutor’s position would consider neither the circumstances surrounding the probation violation nor the background and history of the individual defendant. This Court should therefore decline to adopt it to the extent it violates Michigan’s longstanding sentencing policy.

Part of the prosecution’s concern centralizes on the potentially un-scored Prior Record Variable (“PRV”) 6. (Brief at pages 15-16). This variable assesses points for a defendant’s relationship to the criminal justice system. M.C.L. §777.56. As the prosecutor points out, a defendant might not have received any points for being on probation when initially scored for a sentencing offense, but if a defendant commits an offense while on probation he would receive 10 points under PRV 6, thus creating an anomaly for sentencing after a probation violation. M.C.L. §777.56(1)(c). In response to this Court’s directive, and in accordance with M.C.L. §771.4, it is Defendant-Appellee’s position that the prior record variables would have to be scored in terms of the defendant’s status at the time of the original sentencing. But upon reflection at resentencing for the original offense after a violation of probation, the trial court would be free to find that such a score has been given inadequate or disproportionate weight.

M.C.L. §769.34(3)(b). This would presumably constitute substantial and compelling reasons for a departure from the guidelines pursuant to M.C.L. §769.34(2) as discussed in *Babcock, supra*.

As a final matter, if the Legislature intended for the guidelines not to apply to sentences imposed after probation violations, it could have reflected this view when it adopted the guidelines through Act 317. This is particularly true given the previously well-established view that the judicial guidelines did not apply to probation violations. *See generally, Reynolds, supra; People v. Edgett*, 220 Mich. App. 686 (1997). However, the legislature has taken no such action in the 6 years since the legislative guidelines were first adopted. This strongly suggests the lack of legislative intent to provide an exception to the guidelines for post-probation violation convictions.

For all the reasons set forth above, the legislative sentencing guidelines apply to sentencing after a probation violation for an offense committed after January 1, 1999. Accordingly, this Court should affirm the decision of the Court of Appeals, and remand the case to the trial court for resentencing.

RELIEF REQUESTED

For all of the reasons stated herein, Defendant-Appellee respectfully requests that this Court AFFIRM the Michigan Court of Appeals' decision to remand Mr. Hendrick's sentence of 10 to 20 years in prison for possession of a Molotov cocktail to the trial court for resentencing pursuant to the legislative sentencing guidelines.

Respectfully submitted,

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